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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 78-60

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE, *Appellants*,

v.

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; and ROBERT S. O'BRIEN, Individually and as Washington State Treasurer, *Appellees*.

ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States the appellees move the Court to dismiss the appeal herein for lack of a substantial federal question or, in the alternative, to affirm the judgment of the District Court of the Eastern District of Washington on the ground that it is manifest that the questions on which the de-

cision of the cause depends are so unsubstantial as to not need further argument.

QUESTIONS PRESENTED

1. *The Disclaimer Issue*: Does Public Law 83-280 (67 Stat. 588) require the State of Washington to repeal expressly the "disclaimer" clause contained in Article XXVI of its constitution as a condition for a valid assumption of any jurisdiction, total or partial, over an Indian reservation?

2. *The Equal Protection Issue*: Does chapter 37.12 RCW, as applied to members of the Colville Tribe situated on the Colville Reservation, violate the constitutional rights of those tribal members arising under the Equal Protection Clause of the Fourteenth Amendment in the following circumstances:

(a) Pursuant to the terms of chapter 37.12 RCW, the Colville Tribe has exercised its option to have total state jurisdiction apply to its reservation;

(b) Other tribes in Washington (such as the Lummis and Makahs) have not so exercised this option for their own reservations; and

(c) As a result, certain state laws are applicable to members of the Colville Tribe on the Colville Reservation, while those same laws are not similarly applicable to other Indians on other reservations?

STATEMENT OF THE CASE

A. Washington's Response to Public Law 280.

Public Law 280 (67 Stat. 588), enacted by Con-

gress in 1953, provided for the immediate transfer of jurisdiction over most, though not all, Indian reservations in California, Minnesota, Nebraska, Oregon and Wisconsin from the United States to those respective states. That same act, in §§ 6 and 7, allowed other states to assume such jurisdiction, provided certain conditions were first met.

Responding to that act the State of Washington in 1957 obligated and bound itself to assume civil and criminal jurisdiction over all Indians and Indian reservations located within its borders, but only when a tribe or its governing body adopted a resolution petitioning the State to assume such jurisdiction. (Chapter 240, Laws of 1957).

In 1963 the state legislature amended that act by enacting chapter 36, Laws of 1963, now codified as chapter 37.12 RCW. By this amendment it retained the principle of tribal option, but placed limits upon it.

That amendment provided for the assumption of jurisdiction, civil and criminal, over all "Indians and Indian territory, reservations, country, and lands * * * *" (RCW 37.12.010). However, this broad assumption of jurisdiction was subject to an important exception.

It would not apply to Indians "when on their tribal or allotted lands within an established Indian reservation * * *" if (1) those lands were held in a trust or otherwise restricted status ("trust lands") *and* if (2) the tribe had not petitioned for a

complete assumption of jurisdiction by the state. Thus, the tribal option was limited to determining whether state jurisdiction would be exercised over Indians on trust lands. Jurisdiction over non-Indians, wherever located, and over Indians on non-trust lands was no longer subject to the tribal option.

Two additional features of this option should be noted. First, it was not a complete one, even as to Indians on trust lands. In certain specific subject matters, the state assumed jurisdiction over Indians on these lands even if the tribe did not so request. Those subject matters are compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children and the operation of motor vehicles upon public streets, alleys, roads and highways. (RCW 37.12.010.)

Second, if the tribe exercised its option for complete state jurisdiction, the assumption of that jurisdiction was automatic. The only act left to be taken by any state official was purely ministerial, i.e., issuance of a proclamation by the governor. RCW 37.12-.021. Upon issuance of that proclamation, the jurisdiction was in effect.

The 1957 Act and the 1963 amendment constitute the only action taken by the Washington State Legislature in response to Public Law 280. It has not initiated procedures for repealing the "disclaimer" clause in Article XXVI of the State Constitution.

B. The Appellant Tribes' Varying Responses to Chapter 37.12 RCW.

On January 14, 1965, the Colville Business Council enacted a resolution requesting state assumption of total jurisdiction over the Colville Reservation. The governor issued the proclamation as required by RCW 37.12.021. And on the date of that proclamation, January 29, 1965, total state jurisdiction was in force on the Colville Reservation.

The Lummi and Makah Tribes, however, have never made any such request, under either the original 1957 act or the 1963 amendment.

C. Population Patterns on the Reservations Involved.

On the Colville Reservation, the total population is 7,027, of whom approximately 3,200 are tribal members. (Pre-Trial Order, p. 14). On the Makah Reservation, the total population is 1,435, of whom approximately 900 are tribal members. (Id. at p. 15). On the Lummi Reservation, the total population is approximately 2,150, of whom approximately 1,250 are tribal members. (Id. at p. 14 and The Legal Relationship Between Washington State and its Reservation-based Indian Tribes, Office of Program Research, House of Representatives, Olympia, Washington, December, 1977, p. 29.[1])

[1]The figure of 900 non-Indian residents used in computing the total population on the Lummi Reservation is based upon 1970 census data. (The Legal Relationship Between Washington State and its Reservation-based Indian Tribes, p. 29.)

THIS APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

A. The Disclaimer Issue Has Already Been Resolved By This Court.

In at least eight previous reported cases, including three in which their claims were rejected by this Court, various Indian tribes or individual Indians have attempted to persuade some court that the State of Washington could not validly assume any jurisdiction over Indians or Indian reservations without first amending Article XXVI of its constitution.

This case is the ninth.

In each case in which this question has been presented to either the Supreme Court of the State of Washington, or to a federal district or appellate court, those courts have squarely held that such an amendment was not required by Congress. *State v. Paul*, 53 Wn.2d 789, 337 P.2d 33 (1959); *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648, cert. den. 387 U.S. 907 (9th Cir., 1966); *Dixon v. Rhay*, 396 F.2d 760 (9th Cir., 1968); *Makah Indian Tribe v. State*, 76 Wn.2d 485, 457 P.2d 590, app. dism'd 397 U.S. 316 (1969); *Tonasket v. State*, 84 Wn.2d 164, 525 P.2d 744, app. dism'd 420 U.S. 915 (1974); *Comenout v. Burdman*, 84 Wn.2d 192, 525 P.2d 217, app. dism'd 420 U.S. 915 (1974). Both the district court and the court of appeals adhered to that view in *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington, et al.*, 550 F.2d 443, 444 (9th Cir., 1977), probable jurisdiction

noted February 27, 1978, No. 77-388. In three of those cases that question was squarely presented to this Court on appeal, and in each case the appeal was dismissed for want of a substantial federal question. *Makah Indian Tribe v. Washington*, 397 U.S. 316 (1970); *Tonasket v. Washington*, 420 U.S. 915 (1975); *Comenout v. Burdman*, 420 U.S. 915 (1975).

The disposition of the question should be the same in this case. Appellant tribes provide no reason for it being different.[2]

Further, the fact that these dismissals constitute direct adjudications on the merits provides all the more reason for the disposition of this question being the same.

> "As Mr. Justice Brennan once observed, '[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. * * *' Ohio ex rel. Eaton v. Price, 360 US 246, 247; * * *" *Hicks v. Miranda* 422 U.S. 332 at 343 and 344.

The pendency of *State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, No. 77-388, should, of course, be taken into consideration in determining the disposition of the disclaimer question in this case. For that question *may* be involved in *Yakima* as well.

In *Yakima*, as here, we submit that the question

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[2]The persistence of the Tribes in litigating this question is strikingly illustrated by the fact that the Appellant in the first of these three cases, the Makah Tribe, is also an appellant here. Not only is the principle of *stare decisis* apparently to be jettisoned, but the principle of *res judicata* as well.

is settled, and is not properly before this Court for plenary consideration. The Yakima Tribe and the United States contend that the question has not been settled; they further contend that even if it has been settled, it has been settled incorrectly, and that the supposed error should be corrected after plenary consideration.

We prefer to address these contentions in *Yakima*, not here. In our reply brief, which will be filed shortly, we shall show that the contentions of the United States and the Tribe are without merit; the question has not only been settled, but settled correctly.

The Court, accordingly, may wish to postpone a decision on the disposition of the disclaimer question in this case until the briefing in *Yakima* is complete. It may even wish to wait until after oral argument in *Yakima*.

However, a disposition of the disclaimer question in this case should not delay oral argument in *Yakima*. Yet that would be the inevitable result, we believe, if the Court were to accept the Appellant's suggestion that this case should be consolidated with *Yakima* for oral argument. (Juris. St. at p.2).[3] *Yakima* will be ready for oral argument very shortly; this case will not.

Further, this case involves other issues on which the District Court ruled against the State, and which

[3]Appellants can just as easily present their arguments by filing an amicus curiae brief in *Yakima*. The State has no objection to such participation—and would welcome oral argument by the Colville Tribe as amicus in support of the Yakima Tribe's position.

will be the subject of the State's appeal in this same litigation.[4]

In summary we submit that the disclaimer question as presented in this case should be disposed of by dismissing the appeal or summarily affirming the judgment. The Court may wish to wait before taking that step, until completion of briefing and perhaps even oral argument in *Yakima*. But this case, the main body of which is not yet even before this Court, should not be allowed to delay oral argument and a final decision in *Yakima*.

B. The Equal Protection Issue is Frivolous.

The essence of the argument of the Colville Tribe on this issue is simply stated: No rational basis exists for subjecting members of the Colville Tribe on the Colville Reservation to the full scope of state jurisdiction, while the members of the Lummi and Makah Tribes on their respective reservations are not so subject.

The difficulty with this argument is that, if valid, it proves too much. For example, under § 2 of Public Law 280, as originally enacted, various reservations were specifically excluded from the scope of the jurisdiction conferred upon three of the five "mandatory" statutes. The Red Lake Reservation was excluded from the jurisdiction conferred upon

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[4]Those issues are essentialy three: The right of the State to require Indian vendors to collect state cigarette and retail sales taxes imposed on these vendors' non-Indian customers; the right of the State to impose its motor vehicle excise tax on Indian-owned vehicles used off the reservation; and for the Lummis and Makahs, though not the Colvilles, the same equal protection issue as involved in *Yakima*.

Minnesota, the Warm Springs Reservation from the jurisdiction conferred upon Oregon, and the Menominee Reservation from the jurisdiction conferred upon Wisconsin.

Under the Colville Tribe's argument, Congress thereby violated the Equal Protection Clause.

And apparently Congress violated it again (or at least encouraged its violation by states and tribes) when it unmistakably authorized the "option" states to make further assumption of jurisdiction on a reservation by reservation basis.[5]

The Colville Tribe would be correct, of course, in suggesting that the reason the three named reservations were excluded in § 2 of Public Law 280 is that this result reflected the wishes of the three tribes involved. And the Tribe would also be correct in suggesting that further assumptions of jurisdiction under the 1968 amendments to Public Law 280 on a reservation by reservation basis would likewise reflect the wishes of the tribes involved. For tribal consent, through a tribal referendum, is a necessary condition for any such assumption.

But so too here, the reason the State has assumed total jurisdiction over the Colville Reservation is that *this is what the Tribe wanted.* The Tribe petitioned for total jurisdiction in 1965. Likewise, the

[5]See §§ 401 and 402 of the Civil Rights Act of 1968, P.L. 90-284, 82 Stat. 78. These 1968 amendments to Public Law 280 allow not only selectivity *between* reservations, but selectivity *within* a single reservation, both by subject matter and geographical area. Whether similar selectivity is permissible under Public Law 280 as originally enacted is, of course, a principal issue in *Yakima;* it is not an issue here.

reason the State has not assumed total jurisdiction over the Lummi and Makah Reservations is that this is what those two tribes wanted. They did not petition for total jurisdiction at any time.

We find it difficult to believe that the differing wishes of different tribes do not provide a rational basis for differing jurisdictional results. To put the matter as pointedly as possible: The members of the Colville Tribe are subject to laws different from those governing the Lummis and Makahs for one simple reason. That is the choice the Colville Tribe made for its members.

The Tribe's claim that this results in their members being deprived of their constitutional rights is frivolous.

CONCLUSION

For the reasons given above, the appeal should be dismissed or, alternatively, the judgment appealed from should be summarily affirmed.

Respectfully submitted,

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